

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NOS. 41H)
30012025 AND 41H 30013629 BY UTILITY)
SOLUTIONS LLC)**

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on March 2, 2006, in Bozeman, Montana, to determine whether a beneficial water use permit should be issued to Utility Solutions, LLC, hereinafter referred to as "Applicant" for the above applications under the criteria set forth in Mont. Code Ann. §85-2-311.

APPEARANCES

Applicant appeared at the hearing by and through counsel, Matt Williams and Don MacIntyre. Judge John Brown, and Marty Gagnon, P.E., were called to testify for the Applicant.

Objectors Faust, Lohmeier, Brodie, Shennum and McManus, West Gallatin Canal Company, [collectively, hereafter Faust Group], appeared at the hearing by and through counsel, Art Wittich. West Gallatin Canal Company is a party only in the matter of Application No. 41H 30012025. Objector Roselee Faust; Objector James Lohmeier; Allan Lien, President of West Gallatin Canal Company; Craig White, Director, West Gallatin Canal Company, and Barbara Campbell, for the Applicant were called to testify by the Faust Group.

Objector Montana Department of Fish, Wildlife and Parks appeared at the hearing by and through counsel Robert Lane to observe only.

Objector Montana Trout Unlimited appeared at the hearing by and through counsel Laura Ziemer to observe only.

Objector Association of Gallatin Agricultural Irrigators, Objector Walt Sales, and Objector Francis and Deloris Kelly appeared at the hearing by and through counsel David Weaver to observe only.

Scott Compton, Regional Manager, Bozeman Water Resources Regional Office, Montana Department of Natural Resources and Conservation (DNRC or Department) was called to testify by the Faust Group and recalled by Applicant.

1 Russell Levens, Department of Natural Resources and Conservation (DNRC)
2 Hydrogeologist and Staff Expert, was present at the hearing but not called to testify.
3

4 **EXHIBITS**

5 Both Applicant and Faust Group offered exhibits for the record. The exhibits are
6 admitted into the record to the extent noted below.

7 Applicant offered eighteen exhibits for the record. The Hearing Examiner accepted and
8 admitted into evidence Applicant's Exhibit Nos. A50-A51, and A54-A67, and A69.

9 **Applicant's Exhibit A50** is a six-page copy of official Secretary of State 2003
10 documents regarding the incorporation of "The Four Corners County Water And Sewer District."

11 **Applicant's Exhibit A51** is a one page copy of a map of the Four Corners County Water
12 and Sewer district as of May 24, 2005.

13 **Applicant's Exhibit A52** consists of copies of three documents concerning the Four
14 Corners County Water And Sewer District and Applicant: (1) 29 pages entitled "Water Supply
15 and Wastewater Treatment Service Agreement [signed];" (2) 53 pages entitled "Ordinance No.
16 [unsigned];" and (3) 22 pages entitled "Cotenancy Agreement. [unsigned]"

17 **Applicant's Exhibit A54** consists of ten pages entitled "Amended Direct Testimony of
18 Marty Gagnon."

19 **Applicant's Exhibit A55** consists of a seven-page *Findings of Fact and Order In The*
20 *Matter Of The Application Of LeeLynn, Inc. For Preliminary Plat Approval For The Four Corners*
21 *Minor Subdivision*, signed January 22, 2002 by Gallatin County Commission; and an unsigned
22 one-page document entitled "FINAL PLAT OF FOUR CORNERS MINOR SUBDIVISION NO.
23 ____."

24 **Applicant's Exhibit A56** consists of a sixteen-page *Findings of Fact and Order In The*
25 *Matter Of The Application Of Zoot Enterprises, Inc. For Preliminary Plat Approval For The*
26 *Galactic Park Major Subdivision*, signed by Gallatin County Commission but not dated; and four
27 sheets entitled "THE PRELIMINARY PLAT OF GALACTIC PARK SUBDIVISION."

28 **Applicant's Exhibit A57** consists of a fourteen-page *Findings of Fact and Order In The*
29 *Matter Of The Application Of PC Development For Preliminary Plat Approval For The North Star*
30 *Major Subdivision*, signed January 22, 2002 by Gallatin County Commission; and eight sheets
31 entitled "THE PRELIMINARY PLAT OF NORTH STAR PROJECT AT FOUR CORNERS (A
32 MAJOR SUBDIVISION)."

1 **Applicant's Exhibit A58** consists of a seventeen-page copy of the Domestic
2 Wastewater Permit No.: MT-X000106 (issued by the Montana Department of Environmental
3 Quality (DEQ)), and a two-page Attachment 1.

4 **Applicant's Exhibit A59** is an 11" x 17" sheet entitled "UTILITY SOLUTIONS, LLC
5 SERVICE AREA EXHIBIT 1" plotted February 27, 2006 by M. Gagnon.

6 **Applicant's Exhibit A60** consists of two 11" x 17" Sheets "UTILITY SOLUTIONS, LLC
7 WATER SERVICE AREA" plotted February 27, 2006.

8 **Applicant's Exhibit A61** consists of two 11" x 17" Sheets "UTILITY SOLUTIONS, LLC
9 SEWER SERVICE AREA" plotted February 27, 2006, by M. Gagnon.

10 **Applicant's Exhibit A62** consists of a two-page copy of a January 6, 2005, letter from
11 Sam J. Martinez, Environmental Engineer Specialist, DEQ, Public Water & Subdivisions Bureau
12 to Marty Gagnon, P.E., regarding EQ 04-2805, Utilities Solutions Public Drinking Water System.

13 **Applicant's Exhibit A63** is a copy of page one of a November 23, 2004, letter to Marty
14 Gagnon, P.E. on Montana Department of Environmental Quality letterhead regarding EQ 04-
15 2595, Utility Solutions Public Wastewater Treatment System.

16 **Applicant's Exhibit A64** consists of a copy of a one-page August 2, 2005, letter from
17 Barbara Campbell to Jim Kijawa, Subdivision Review Section – Permitting and Compliance
18 Division (DEQ) regarding Black Bull Run Subdivision, wastewater treatment and disposal.

19 **Applicant's Exhibit A65** consists of a copy of a one-page September 26, 2005, letter
20 from Barbara Campbell to Jim Kijawa, Subdivision Review Section – Permitting and Compliance
21 Division (DEQ) regarding Middle Creek Parkland Subdivision, public water supply system.

22 **Applicant's Exhibit A66** consists of five pages regarding "UTILITY DIVISION, DOCKET
23 NO. D2005.11.163, ORDER NO. 6707, INTERIM ORDER, dated January 10, 2006, Montana
24 Public Service Commission.

25 **Applicant's Exhibit A67** consists of five pages regarding "UTILITY DIVISION, DOCKET
26 NO. D2005.11.164, ORDER NO. 6708, INTERIM ORDER, dated January 10, 2006, Montana
27 Public Service Commission.

28 **Applicant's Exhibit A69** is a three-page letter and attached map dated October 25,
29 2005, from Barbara Campbell to John Hulme (Four Corners Water And Sewer District).

30 Objectors (Faust Group) offered ten exhibits for the record. The Hearing Examiner
31 accepted and admitted into evidence Objector's Exhibit Nos. OW3, OW24-OW25, OW27-
32 OW30, OW33, and OW46.

Objector's Exhibit OW3 is a one-page copy of a March 8, 2004, email from Kim Overcast (DNRC) regarding the current municipal use definition.

Objector's Exhibit OW24 is a four-page copy of the Utility Solutions, LLC Beneficial Water Use Permit Application No. 30012025 received by DNRC August 27, 2004.

Objector's Exhibit OW20 was offered but not admitted.

Objector's Exhibit OW25 is one-page copy of a letter from Scott Compton (DNRC) to Utility Solutions, LLC, % Don MacIntyre.

Objector's Exhibit OW27 is a one-page copy of a November 24, 2004, Memorandum from Scott Compton (DNRC) to Terri McLaughlin (DNRC).

Objector's Exhibit OW28 is a one-page copy of a December 2, 2004, Memorandum from Scott Compton (DNRC) to Russell Levens (DNRC).

Objector's Exhibit OW29 is a three-page copy of a December 7, 2004, letter from Martin Gagnon, P.E. to the DNRC, ATTN: Scott Compton.

Objector's Exhibit OW30 is a one-page copy of an email from Scott Compton (DNRC) to Russell Levens (DNRC) regarding the "12/2 memo on Utility Solutions Application."

Objector's Exhibit OW33 is a nineteen-page copy of a February 8, 2005, letter and enclosures regarding Utility Solutions, LLC 's revisions to Beneficial Use Permit # 30012025-41H from Barb Campbell to Jan Mack, Water Resources Specialist (DNRC).

Objector's Exhibit OW46 Is a sixty-six-page copy of a February 24, 2006, letter and enclosures from Judy Schneider, Montana Public Service Commission (regarding Utility Solutions, LLC and Rates and Charges for Elk Grove Subdivision, Gallatin County, Montana) to Art Wittich regarding Utility Solutions, LLC files.

PRELIMINARY MATTERS

The Hearing Examiner consolidated the hearings on Beneficial Water Use Permit No. 41H 30012025 and Beneficial Water Use Permit No. 41H 30013629 into one proceeding. A single hearing was held and this proposal will apply to both applications as if they were one.

Objector Wendell was defaulted and her objection dismissed by the Hearing Examiner in a prehearing order. Objector Hattleberg and Objector Davis withdrew their objections prior to the hearing. Objector Davis, who filed the water quality objection to Application No. 41H 30013629, withdrew her objection on November 16, 2005; thus water quality was not an issue for the hearing.

1 Objector Montana Department of Fish, Wildlife and Parks (FWP); Objector Montana
2 Trout Unlimited; Objectors Kelly, Sales, and Association of Gallatin Agricultural Irrigators
3 indicated that they had entered into a settlement agreement with the Applicant, entitled Consent
4 To Entry Of Administrative Orders In the Matter of the Applications For Beneficial Water Use
5 Permit No. 41H 30012025 and No. 41H 30013629, dated December 12, 2005, attached hereto
6 as Attachment 1 and beginning on page 27 [hereinafter Permit Consent], and that they did not
7 intend to participate in the March 2, 2006, hearing in this matter. The Faust Group filed a Notice
8 of No Contest To Certain Facts and Reservation of Rights, dated December 14, 2005, that
9 stated that they would not contest the facts set forth in the Permit Consent, with a reservation of
10 “any and all their rights to introduce evidence and oppose the issuance of any permits in the
11 above-styled matters (this case) on any other grounds, including reservation to introduce
12 evidence and argue that augmentation is not allowed or available to meet any criteria under
13 MCA 85-2-311 or MCA 85-2-402, including without limitation any evidence that DNRC should
14 not have processed the application.”

15 With this background, I issued the February 14, 2006, Order On Motion To Limit Matters
16 In Contested Case Proceeding And Setting Hearing Date limiting the factual issues remaining
17 for hearing to: (1) Municipal Use: whether the “municipal use” exception applies to the permit
18 applications in the context of the Upper Missouri River Closure; (2) Is Applicant’s system
19 proposed to serve the permits at issue regulated by the Public Service Commission (PSC) and
20 included in the Applicant’s regulated rate base as a regulated asset(s); (3) Is only that portion of
21 Applicant’s system serving the Elk Grove development regulated by the PSC; (4) Are the tariffs
22 under which the Applicant proposes to provide service under these permits filed with and
23 approved by the PSC for the service proposed under these permits; (5) whether “augmentation”
24 as contemplated in Applicant’s plan is allowable within the context of Mont. Code Ann. § 85-2-
25 311. The Order allowed the Parties to brief the following legal issues, due simultaneously at or
26 the before the start of the permit hearing: (1) is augmentation as a plan available to the
27 Applicant within the context of the Mont. Code Ann. § 85-2-311; (2) can the Applicant augment
28 out of the closure in the Upper Missouri River (i.e., if ground water is immediately or directly
29 connected to surface water, can the Applicant replace depleted surface flows through
30 augmentation [allowed even though not at issue in this matter as result of Order On Motion To
31 Limit Matters In Contested Case Proceeding And Setting Hearing Date]). The Parties were
32 allowed the opportunity to present their fundamental legal position in briefs on the allowed legal
33 issues. The Hearing Examiner received briefs at the start of the hearing from Applicant

1 (municipal, augmentation), Faust Group (augmentation), Objector FWP (augmentation), and
2 Objector Montana Trout Unlimited (augmentation).

3 At the conclusion of the hearing in these matters the record was left open until March 10,
4 2006, for receipt of verifications of by those submitting written pre-filed testimony, and for
5 clarification of which set of pre-filed testimony¹ is to be used. Applicant filed verifications for
6 Marty Gagnon, Richard Stenzel, Michael B. Kaczmarek, and Michael Nicklin. Faust Group filed
7 verifications for Eloise Kendy and Terry Threlkeld. Applicant clarified that the second set of pre-
8 filed testimony which was responsive to amended scheduling orders arising out of consolidation
9 is to be used in making this decision. However, all exhibits referenced and attached to the first
10 set of pre-filed testimony remain the applicable references to the second set of pre-filed
11 testimony, except where specifically referenced exhibits accompany the second set of pre-filed
12 testimony. Faust Group provided a copy of their pre-filed testimony (originally filed November
13 18, 2005 for both the consolidated permit applications and the associated Application to Change
14 No. 41H 30014080), along with attached exhibits.

15 The Hearing Examiner hereby takes official notice of the June 1, 2006, Montana
16 Administrative Register and the official records of the Montana Water Court and the Department
17 as represented respectively in Exhibits A and B to Applicant's Memorandum of Points and
18 Authorities on Municipal Use, dated February 27, 2006, which is part of the record in this matter.
19 Mont. Admin. R. 36.12.221. If any portion of those exhibits is found to be inconsistent with the
20 official records of the Department or the Montana Water Court, the official records control.
21 Parties are afforded the opportunity to contest the material noticed in an exception to this
22 Proposal. Mont. Admin. R. 36.12.229.

23 Because there was testimony at the hearing questioning the operations of the Four
24 Corners County and Water Sewer District and its contract with the Applicant for water service, I
25 will again reiterate those issues that the Department does not have the authority to decide in
26 this case. After hearing argument on Applicant's Motion To Limit Matters In Contested Case
27 Proceedings And Setting Hearing Date, I clarified in my Order of February 14, 2006, that I do
28 not have the authority to decide whether a valid contract exists between the Applicant and Four
29 Corners Water And Sewer District, easement and local zoning issues, and matters within the
30 jurisdiction of the PSC. See, e.g., Auto Parts of Bozeman v. Employment Relations Div.

¹ Pre-filed testimony was received prior to the consolidation of the two permit application hearings, and following consolidation of the hearings. Clarification was necessary to make clear for the Hearing Examiner which pre-filed testimony to use in making his decision.

1 Uninsured Employers' Fund, 2001 MT 72, 305 Mont. 40, 23 P.3d 193 (an administrative agency
2 has only those powers specifically conferred upon it by the legislature; Department of Labor
3 lacked authority to decide a contractual issue). Likewise, I clarified that I do not have the
4 authority to decide whether the Four Corners Water and Sewer District is a validly constituted
5 and operated entity. Id. These are issues properly brought before a district court. Having
6 clarified that, I did ask Applicant to help me better understand Applicant's representations as to
7 what the PSC regulates regarding the proposed service under these proposed permits as
8 evidenced by the issues set for hearing.

9
10 The Hearing Examiner, having reviewed the record in this matter and being fully advised
11 in the premises, does hereby make the following:
12

13 **FINDINGS OF FACT**

14 **General**

- 15 1. Application for Beneficial Water Use Permit No. 41H 30012025 in the name of Utility
16 Solutions, LLC, % Barbara Campbell and signed by Barbara Campbell was filed with the
17 Department on August 27, 2004. (Department file)
- 18 2. Notice of Application No. 41H 30012025 including information about the proposed
19 application and the procedure for filing objections was published in *Bozeman Daily Chronicle*, a
20 newspaper of general circulation, on March 15, 2005. The notice was also mailed to persons
21 listed in the Department file on March 11, 2005. (Department file)
- 22 3. Application for Beneficial Water Use Permit No. 41H 30013629 in the name of Utility
23 Solutions, LLC, % Barbara Campbell and signed by Marty Gagnon, was filed with the
24 Department on December 29, 2004. Mr. Gagnon has written authorization from Ms. Campbell to
25 execute all documents and applications related to DNRC submittals on her behalf. (Department
26 file)
- 27 4. Notice of the Application No. 41H 30013629 including information about the proposed
28 application and the procedure for filing objections was published in *Bozeman Daily Chronicle*, a
29 newspaper of general circulation, on June 15, 2005. The notice was also mailed to persons
30 listed in the Department file on June 6, 2005. (Department file)
- 31 5. The individual Environmental Assessments (EA) prepared by the Department for these
32 Applications were reviewed and are included in the record of this proceeding. (Department files)

6. In Application No. 41H 30012025, as noticed, Applicant seeks to appropriate 800 gallons per minute (gpm) up to 455.29 acre-feet of water per year from ground water. The proposed means of diversion is eight (8) wells located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, all in Section 11, Township 2 South, Range 4 East, Gallatin County, Montana. The proposed use is municipal use. The proposed place of use is within the Utilities Solutions, LLC service area, in Section 11, and in the E $\frac{1}{2}$, of Section 14, all in Township 2 South, Range 4 East, Gallatin County, Montana. The proposed period of diversion and period of use is January 1 through December 31, inclusive, of each year. The proposed off-stream storage with a capacity of 2.3 acre-feet is located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, Township 2 South, Range 4 East, Gallatin County, Montana. (Department file)

7. The Permit Consent is a settlement document and will be treated as application amendments and conditions where appropriate. The Permit Consent places the following limitations on the proposal in Application No. 41H 30012025: (A) the flow rate and volume are limited to 800 gpm up to 318.8 acre-feet; (B) No more than 71.7 acres of lawn and /or gardens may be irrigated; (C) The place of use is located in the Section 11, and in the E $\frac{1}{2}$, of Section 14, all in Township 2 South, Range 4 East, Gallatin County, Montana; (D) the points of diversion shall be comprised of eight (8) wells located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, all in Section 11, Township 2 South, Range 4 East, Gallatin County, Montana. Permittee may pump and withdraw water up to the amounts set forth herein from all or any part of the uppermost 100 feet of saturated thickness of the aquifer(s) underlying these points of diversion that the Permittee may elect, and Permittee shall plug any well bore in excess of that 100 foot depth using such methods and practices as are ordinarily and customarily used for such practices; (E) Permittee shall install or cause to be installed at each well a meter capable of recording the flow rates and volumetric amounts diverted from each such well. Permittee shall also record the total amount of water treated at its wastewater treatment plant, and the total amount of water discharged into its disposal beds. Permittee shall provide those records to the DNRC by October 15th of each year. Permittee shall install or cause to be installed inside each well a water-level measurement access tube and sampling port to facilitate water level and water quality measurements. Permittee shall cooperate with state, county, and university sponsored researchers to provide access to their wells for the purpose of taking well depth and water quality measurements to the fullest extent possible without compromising Permittee's

1 water delivery operations; (F) the exercise of this Permit shall be augmented in accordance with
2 Part II of the Consent To Administrative Order executed by the Parties in the Matter of
3 Application To Change Water Right No. 41H 30014080, dated December 12, 2005, attached
4 hereto as Attachment 2 and beginning on page 34 [hereinafter Change Consent]; (G) the water
5 treated at the waste water treatment plant and discharged to the disposal beds shall be deemed
6 return flow from and after the use provided for herein, and the Permittee shall not further divert
7 or use such return flows under the rights provided for in the Permit. (Department file, Permit
8 Consent)

9 8. In Application No. 41H 30013629, as noticed, Applicant seeks to appropriate 100 gpm
10 up to 29.45 acre-feet of water per year from ground water. The water is to be diverted at a point
11 in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, Township 2 South, Range 4 East, Gallatin County,
12 Montana. The proposed means of diversion is a well. The proposed use is municipal use. The
13 proposed place of use is within the Utilities Solutions, LLC service area, in the NW $\frac{1}{4}$ of Section
14 14, and in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, of Section 15, all in Township 2 South, Range 4 East, Gallatin
15 County, Montana. The proposed period of diversion and period of use is January 1 through
16 December 31, inclusive, of each year. (Department file)

17 9. The Permit Consent document is a settlement document and will be treated as
18 application amendments and conditions where appropriate. The Permit Consent places the
19 following limitations on the proposal in Application No. 41H 30013629: (A) the flow rate and
20 volume are limited to 100 gpm up to 29.45 acre-feet per year. No lawns or gardens, nor any
21 other acreage, shall be irrigated with any diversions hereunder; (B) The place of use is located
22 in the SW $\frac{1}{4}$ of Section 14, and in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15, Township 2 South, Range 4
23 East, Gallatin County, Montana; (C) the points of diversion shall be comprised of wells located
24 in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ [9th well location], SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$,
25 SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, and the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ all
26 in Section 11, Township 2 South, Range 4 East, Gallatin County, Montana; (D) Permittee may
27 pump and withdraw water up to the amounts set forth herein from all or any part of the
28 uppermost 100 feet of saturated thickness of the aquifer(s) underlying these points of diversion
29 that the Permittee may elect, and Permittee shall plug any well bore in excess of that 100 foot
30 depth using such methods and practices as are ordinarily and customarily used for such
31 practices; (E) Permittee shall install or cause to be installed at each well a meter capable of
32 recording the flow rates and volumetric amounts diverted from each such well. Permittee shall

1 provide those records to the DNRC by October 15th of each year. Permittee shall install or
2 cause to be installed inside each well a water-level measurement access tube and sampling
3 port to facilitate water level and water quality measurements. Permittee shall cooperate with
4 state, county, and university sponsored researchers to provide access to their wells for the
5 purpose of taking well depth and water quality measurements to the fullest extent possible
6 without compromising Permittee's water delivery operations; (F) the exercise of this permit shall
7 be augmented in accordance with Part II of that certain Consent To Administrative Order
8 executed by the Parties in the Matter of Application To Change Water Right No. 41H 30014080
9 (Change Consent); (G) the water treated at the waste water treatment plant and discharged to
10 the disposal beds shall be deemed return flow from and after the use provided for herein, and
11 the Permittee shall not further divert or use such return flows under the rights provided for in the
12 Permit. (Department file, Permit Consent)

13 10. The Notice of Application No. 41H 30013629 lists one point of diversion for one well, not
14 nine as provided for in the Permit Consent. The Noticed place of use for each Application is for
15 the "Utility Solutions, LLC, service area"; yet, each Notice indicates different places of use. In
16 addition, the noticed place of use and the place of use in the Permit Consent do not agree. The
17 Application states that the Application is for an extension of the Utility Solutions, LLC, service
18 area to include "Gallatin River Hideaway." Applicant's Exhibit No. A60 shows that the place of
19 use is as noticed and not as contained in the Permit Consent. The Hearing Examiner
20 understands that the waters of the nine (9) wells will be commingled in the water system service
21 area. However, the Applications limit the flow rates of each well and the volume under each
22 Application such that commingled waters within the system can not expand the uses.
23 (Department file)

24 11. The Applicant is regulated by the PSC for the service that it provides to the Elk Grove
25 development. The Applicant is not regulated by the PSC for the service proposed under these
26 permit applications.

27 12. The Applicant has a contract to provide water to the Four Corners County Water and
28 Sewer District for the use proposed under these Applications.

29 13. The Hearing Examiner takes official notice of the June 1, 2006, Montana Administrative
30 Register, deleted the definition of municipal use found at Mont. Admin. R. 36.12.101(39), and
31 the official records of water rights for municipal uses of the Montana Water Court and the
32 Department as represented respectively in Exhibits A and B to Applicant's Memorandum of

1 Points and Authorities on Municipal Use, dated February 27, 2006, which is part of the record in
2 this matter. Mont. Admin. R. 36.12.221. If any portion of those exhibits is found to be
3 inconsistent with the official records of the Department or the Montana Water Court, the official
4 records control.

5 **Physical Availability**

6 14. Three wells have been drilled and two production wells have been tested. Applicant
7 estimated the volume of water flowing through the aquifer in the area of potential impact.
8 Applicant contends there is adequate evidence from pumping tests of the two existing wells and
9 nearby wells to conclude that water is physically available at the rate and volume they request.
10 Applicant reviewed three aquifer tests conducted for this project: (1) one test of a relatively
11 shallow alluvial aquifer from the water table down to 65 feet, pumped at 410 gpm; (2) one in
12 deeper Tertiary aged sediments from 477 to 87 feet, pumped at 100 gpm; and (3) one in deeper
13 Tertiary aged sediments from 527 to 553 feet, pumped at 155 gpm. Applicant's analysis was
14 performed on data from pumping tests on wells in the project site. Applicant has shown that
15 water in the rate and volume requested is physically available. The Department's Staff Expert
16 agreed that sufficient water was physically available. (Department file, testimony of Marty
17 Gagnon, Michael Kaczmarek, Russell Levens)

18 **Legal Availability**

19 15. Applicant originally compared an estimate of the existing legal demands from the DNRC
20 database (2252.37 acre-feet diverted) with the Applicant's earlier proposed request (of 582.2
21 acre-feet diverted at the 800 gpm pumping rate) for a total demand of 2834.57. Demands were
22 compared to an estimate of the volume of water flowing through the combined Tertiary and
23 Quaternary aquifers in the area of potential impact (11250.6acre-feet/year) of the 800 gpm
24 wells. The current water requirements ($318.8+29.45=348.25$ acre-feet) are less than those
25 originally assumed for the earlier analysis. Water available in the aquifer is greater than the
26 existing demands including the Applicant's request. Applicant has shown that the total demand
27 is less than the available ground water flowing through the Four Corners area which includes
28 and surrounds the Utility Solutions, LLC service area. This is a standard analysis accepted by
29 DNRC and is a reasonable assessment of legal water availability. Applicant has shown that
30 water is legally available. (Department file, Michael Kaczmarek)

1 **Adverse Effect**

2 16. Applicant's total water consumption under both Applications, as amended, is 167.91
3 acre-feet per year. That volume will irrigate lawns, gardens, parks, etc. in the Utility Solutions,
4 LLC, service area in accordance with the Permit Consent, and provide for the requested
5 domestic consumption. Applicant plans to augment the service area ground water with a 1.88
6 cubic feet per second (cfs) 1866 surface water right from the West Gallatin River historically
7 used to irrigate 200 acres in this service area. Applicant's augmentation plan uses an infiltration
8 gallery to place the historical irrigation water right into the aquifer during its historic period of
9 diversion. Using an infiltration gallery will augment the West Gallatin River area surface water,
10 which is connected to the area ground water, during all months of the year as the consumption
11 occurs. Applicant's augmentation plan will offset any depletions from the West Gallatin River.
12 Applicant's proposed use when augmented according to the augmentation plan will not
13 adversely affect surface water users. No party contests the facts of the augmentation plan,
14 amounts augmented, and that the facts comply with Mont. Code Ann. §85-2-311. (Department
15 file)

16 17. Applicant compared available drawdown in all wells within a calculated zone of influence
17 to drawdown for the effect of proposed wells on other wells for the requested rate, volume, and
18 period of diversion. Ground water wells within the potential area of impact will not be adversely
19 affected because there is an adequate water column above the well pumps to accommodate the
20 minimal drawdown. (Department file)

21 **Adequacy of Appropriation Works**

22 18. The proposed wells, pumps, distribution and treatments system are reasonable and
23 customary for their intended purposes. The intended purposes are designed and constructed as
24 a single integrated system for the pumping and delivery of water to homes and businesses in
25 and about the Four Corners area. The pumps, wells, pipelines, distribution and treatment
26 system for the water supply system, and the operation are extensively regulated by the Montana
27 DEQ. The means of diversion, construction, and operation of the appropriation works are
28 adequate. No party contested this issue. (Department file)

29 **Beneficial Use**

30 19. Applicant has acquired part of a Beneficial Water Use Permit right for domestic and
31 commercial uses originally granted to Zoot Properties, LLC which provides water to Galactic
32 Park, a portion of the place of use identified in these applications. See In the Matter of

1 Application For Beneficial Water Use Permit No. 41H 115469-00 by Zoot Properties, LLC. This
2 permit decision is currently on appeal to the First Judicial District. In the event a permit right
3 under the Zoot Properties, LLC issues, and the appropriation set forth therein is actually
4 perfected and exercised, Applicant is willing to incorporate a condition under these Applications
5 reducing its right to divert the full amounts set forth herein by the flow rates actually pumped
6 under any permit issued pursuant to Application for Beneficial Water Use Permit No. 41H
7 115469-00, and a condition reducing the volumetric amounts pumped under any permit to be
8 issued under these applications by the volumetric amounts diverted under any permit issued
9 under Application for Beneficial Water Use Permit No. 41H 115469-00. Not acknowledging this
10 redundancy would allow twice the water needed for the domestic and commercial uses in the
11 overlapping place of use in both applications. (Department file)

12 20. Applicant has provided persuasive evidence that the proposed use is a beneficial use of
13 water. Applicant intends to use the water to supply water within the identified place of use for
14 municipal use, which includes: (1) commercial, industrial, and domestic water requirements; (2)
15 fire suppression and fire fighting for the structures located within the place of use; and (3)
16 irrigation of lawns, gardens, public purposes inherent in the various parks and common areas.
17 The Applicant has a contract with the Four Corners County Water and Sewer District to provide
18 water for these uses. The Application proposes an above ground storage reservoir sized to
19 provide 480,000 gallons for the required fire suppression use, and to provide 129,384 gallons
20 for four hours of maximum day demand. The proposed use is a municipal use and beneficial
21 use of water. (Department file, testimony of Scott Compton)

22 **Possessory Interest**

23 21. Applicant has affirmed that it has the possessory interest, or the written consent of the
24 person with the possessory interest in the property where the water is to be put to beneficial
25 use. No party contested this issue. (Department file)

26 **Water Quality Issues**

27 22. No objections relative to water quality were filed against Application No. 41H 30012025.
28 One objection relative to water quality was filed against Application No. 41H 30013629. Objector
29 Davis withdrew her objection prior to the hearing. Therefore, there are no valid water quality
30 objections remaining to this application. There were no objections relative to water classification
31 or to the ability of a discharge permit holder to satisfy effluent limitations of his permit.
32 (Department file)

1 **Basin Closure Issues**

2 23. The DNRC cannot process or grant an application for a permit to appropriate water
3 within the Upper Missouri River basin until the final decrees have been issued in accordance
4 with Mont. Code Ann. Title 85, Chapter 2, Part 2 for all of the subbasins of the Upper Missouri
5 River basin. The “Upper Missouri River basin” means the drainage area of the Missouri River
6 and its tributaries above Morony Dam. Mont. Code Ann. §85-2-342(4). The proposed wells are
7 located in the Gallatin Valley which is within the Upper Missouri River basin closure area.
8 However, there are exceptions to this closure for applications for permits to appropriate water
9 for domestic, municipal, or stock use. Mont. Code Ann. §85-2-343(2)(c) and §85-2-342.
10 (Department file, testimony of Scott Compton)

11 24. Applicant admits that it is not a municipality. The proposed use, however, is a high
12 density use for domestic, commercial, industrial, firefighting, parks etc. of the type normally
13 found in a municipal use. The DNRC made a determination that these applications are for a
14 permit to appropriate water for a municipal use, which allowed processing of these Applications
15 to continue. (Department file, testimony of Barb Campbell, Scott Compton, James Lohmeier,
16 Roselee Faust, Craig White)

17 Based on the foregoing Findings of Fact and the record in this matter, the Hearing
18 Examiner makes the following:

19
20 **CONCLUSIONS OF LAW**

21 1. The use proposed by this Applicant is a municipal use for which a water right can be
22 acquired by this Applicant and the Applications were properly processed. See Conclusion of
23 Law No. 2. The DNRC cannot process or grant an application for a permit to appropriate water
24 within the Upper Missouri River basin until the final decrees have been issued in accordance
25 with Mont. Code Ann. Title 85, Chapter 2, Part 2 for all of the subbasins of the Upper Missouri
26 River basin. The “Upper Missouri River basin” means the drainage area of the Missouri River
27 and its tributaries above Morony Dam. Mont. Code Ann. §85-2-342(4). However, applications for
28 beneficial water use permits to appropriate water for domestic, municipal, or stock use, i.e.,
29 exceptions to the closure, can be processed prior to issuance of final decrees for all the
30 subbasins of the Upper Missouri River basin. See Mont. Code Ann. §§85-2-342, 343(2)(c). See
31 Finding of Fact No. 23.

1 The issue was raised as to whether an applicant could “augment” out of the Upper
2 Missouri River basin closure, i.e. augment flows so as to become a nonconsumptive exception,
3 Mont. Code Ann. §85-2-343(2)(b). (This is a separate issue from augmenting flows to address
4 Mont. Code Ann. §85-2-311 criteria, such as adverse effect, see *infra* Conclusion of Law No. 8).
5 There is no “augmentation” exception in Mont. Code Ann. § 85-2-343(2). As a general rule, a
6 statute must be interpreted with its plain meaning. E.g., Ravalli County v. Erickson, 2004 MT 35,
7 ¶¶ 11 and 12, 320 Mont. 31, 85 P.3d 772 (intention of the legislature determined from the plain
8 meaning of the words used, and if interpretation of the statute can be so determined, the courts
9 may not go further); Haux v. Montana Rail Link, Inc., 2004 MT 233, ¶ 12, 322 Mont. 456, 97
10 P.3d 540; Highlands Golf Club v. Ashmore, 2002 MT. 8, ¶20, 308 Mont. 111, 36 P.3d 697
11 (where the statute is clear and unambiguous, the statute speaks for itself and the court neither
12 inserts what has been omitted or omits what has been inserted, Mont. Code Ann. §1-2-101).
13 The list of specific exceptions to basin closure implies the exclusion of all others. E.g., State
14 Highway Commission v. West Great Falls Flood Control and Drainage Dist. (1970), 155 Mont.
15 157, 163, 468 P.2d 753, 757 (rule of statutory construction embodied in the Latin phrase
16 'expressio unius est exclusio alterius,' the express mention of one thing implies exclusion of
17 similar things not mentioned). If an application does not fit into one of the delineated exceptions,
18 the plain language of the statute dictates that DNRC may not process the application. Here, the
19 application fits into the “municipal use” exception.

20 2. The proposed use is a municipal use. Faust Group argue that this Applicant cannot
21 appropriate water for a municipal use because it is not a municipality or unincorporated town.
22 The Faust Group rely on Mont. Admin. R. 36.12.101(39), deleted June 1, 2006, which defined
23 municipal use. They further argue that DNRC has not issued permits to a non municipality or
24 unincorporated town within a basin closure area in the past. They provide no other authority
25 regarding the meaning of “municipal use” as used in the basin closure Mont. Code Ann. §85-2-
26 343(2)(c) or elsewhere.

27 Appropriations are classified into different purposes of use based on the type of use
28 manifested in the appropriation, not by the character of the appropriator. Montana Water Use
29 Act, Mont. Code Ann. Title 85, Chapter 2, makes no distinction based on the character of the
30 appropriator for general appropriations². This is consistent with the Montana Constitution, which

² This is with the exception of a water reservation which is a unique reservation of waters under the Montana Water Use Act by specified public entities. Mont. Code Ann. §85-2-316.

1 provides: “(1) All existing rights to the use of any waters for any useful or beneficial purpose are
2 hereby recognized and confirmed;(2) The use of all water that is now or may hereafter be
3 appropriated for sale, rent, distribution, or other beneficial use . . .” MT CONST. Art. IX, §3.
4 Neither the Montana Constitution nor the Montana Water Use Act places restrictions on the type
5 of appropriator who can appropriate water for a specific type of beneficial use.³

6 Moreover, in addressing abandonment issues for “municipal use” water rights, Mont.
7 Code Ann. §85-2-227(4) specifically provides:

8 In a determination of abandonment made under subsection (3), the legislature finds that
9 a water right that is claimed for **municipal use** by a city, town, or other public or **private**
10 **entity that operates a public water supply system**, as defined in [75-6-102](#), is
11 presumed to not be abandoned if the city, town, or other **private** or public entity has
12 used any part of the water right or municipal water supply and there is admissible
13 evidence that the city, town, or other public or **private** entity also has:

14
15 (Emphasis added). When the Department is construing the meaning of “municipal use” under
16 Mont. Code Ann. §85-2-343(2)(c), it cannot do so in a vacuum. It must also be cognizant of
17 other statutes so as to construe them consistently. *State v. Heath*, 2004 MT 126, ¶24, 321 Mont.
18 280, ¶24, 90 P.3d 426¶24, (Statutory construction is a 'holistic endeavor' and must account for
19 the statute's text, language, structure, and object); *S.L.H. v. State Compensation Mutual*
20 *Insurance Fund*, 2000 MT 362, ¶ 16, 303 Mont. 364, ¶ 16, 15 P.3d 948, ¶ 16, *citing*, *United*
21 *States Nat'l Bank v. Indep. Ins. Agents of Am., Inc.* (1993), 508 U.S. 439, 455, 113 S.Ct. 2173,
22 2182, 124 L.Ed.2d 402, 418). The Legislature is presumed to have known of existence of prior
23 statutes when it acts. *Ritchie v. Town of Ennis*, 2004 Mont. 43, 320 Mont. 94, ¶ 20, 86 P.3d 11,
24 *State ex rel. Replogle v. Joyland Club*, 124 Mont. 122, 220 P.2d 988 *Blythe v. Radiometer*
25 *America, Inc.* (1993), 262 Mont. 464, 866 P.2d 218 (court presumes that legislature enacts law
26 with full knowledge of all existing laws on same subject). In this case, the Legislature must be
27 presumed to have had knowledge of the meaning of “municipal use” in Mont. Code Ann. §85-2-
28 343(2)(c), enacted in 1993, when it enacted Mont. Code Ann. §85-2-227(4) in 1999, specifically
29 stating, “water right that is claimed for **municipal use** by a city, town, or other public or **private**
30 **entity that operates a public water supply system . . .**”

³ This is consistent with pre-1973 appropriation in Montana. E.g., *Bailey v. Tintinger* (1912), 45 Mont. 154, 122 P. 575. Relying on language in the original Montana Constitution similar to the 1972 Montana Constitution, the Montana Supreme Court held that an appropriator need not be an owner or in possession of land to appropriate water for irrigation use for use by others and the use may be prospective, also citing *Toohey v. Campbell* (1900), 24 Mont. 13; *Miles v. Butte Electric & Power Co.* (1905), 32 Mont. 56; *Smith v. Duff*, 39 Mont. 382 (1909).

1 To interpret otherwise is to purposefully construe a conflict between two statutes, which
2 is contrary to the statutory construction maxim to reconcile conflicting statutes and to make
3 them operative in accordance with legislative intent if possible. Ex parte Naegele (1924), 224 P.
4 269; State v. Board of Com'rs of Hill County (1919) 185 P. 147 (cardinal principle for
5 construction of statutes is that, if possible, effect shall be given to all parts of the statute;
6 where two provisions of an act are conflicting, the last in order of arrangement controls); Mont.
7 Code Ann. §1-2-101 (Where there are several provisions or particulars, such a construction is, if
8 possible, to be adopted as will give effect to all.); State ex rel. Bennick v. District Court of
9 Thirteenth Judicial Dist. (1975), 167 Mont. 389, 391, 538 P.2d 1369, 1370, citing, Cottingham v.
10 State Board of Examiners (1958) 134 Mont. 1, 25, 328 P.2d 907, 919 (court is pledged to
11 reconcile conflicting statutory provisions and make them operative in accordance with the
12 legislative intent, insofar as it is possible to do so.). To effectuate the intent of both Mont. Code
13 Ann. §§85-2-227(4) and 85-2-343(2)(c) is to read the meaning of “municipal use” consistently.

14 It has also long been a rule of statutory construction that a literal application of a statute
15 which would lead to absurd results should be avoided whenever any reasonable explanation
16 can be given consistent with the legislative purpose of the statute. State v. Heath, ¶32; see
17 Chain v. Dept. of Motor Vehicles, 2001 MT 224, ¶ 15, 306 Mont. 491, ¶ 15, 36 P.3d 358, ¶ 15;
18 Darby Spar. Ltd. v. Dept. of Revenue (1985), 217 Mont. 376, 379, 705 P.2d 111, 113; State ex
19 rel. Special Road Dist. No. 8 v. Mills (1927), 81 Mont. 86, 96, 261 P. 885, 889. Reading Mont.
20 Code Ann. §85-2-343(2)(c) as providing only for “municipal use” by a municipality or town would
21 lead to an overly constricted result, i.e. counties, water and sewer districts, state and federal
22 agencies, etc. could not obtain a municipal water right. It could also lead to the result that a
23 water right (claim or permit) for “municipal use” could not be transferred to an entity/person not a
24 municipality or town. The Legislature has not provided for such restriction on the alienability of
25 water rights (property rights), and specifically those for “municipal use.” Restraints on alienability
26 of property interests are not favored. E.g., Mont. Code Ann. §70-1-405.

27 The reference to “municipal use” by “a city, town, or other public or **private entity that**
28 **operates a public water supply system.**” in Mont. Code Ann. §85-2-227(4) is consistent with
29 the Department’s permitting actions and those of the Montana Water Court in recognizing
30 “municipal use” by entities/persons other than cities, towns, or municipalities. A brief review of
31 the Montana Water Court Records regarding pre-1973 claims for municipal use reveals
32 hundreds of claims to:

- 33 • Individuals (ex. Ella Woodley, Nancy Abercrombie, Greg Barnes, William Boehler)

- Home Owners Associations (ex. Greenacres West, Coram Private Water System
- Private Water Companies (ex. Mountain Water Company, Coffee Creek Water Company)
- Irrigation Companies/Districts (ex. Pondera Canal and Reservoir Company, Malta Irrigation District, Bozeman Creek and Reservoir Company)
- Railroad Companies (ex. Chicago Milwaukee St. Paul, BNSF)
- Religious Organizations (ex. Church Universal Triumphant, Inc., Birch Creek Colony, Inc.)
- Other Companies/Organizations (ex. Daly Realty Company, Glacier Park, Inc., Caroline Point Partnership, Northwestern, Park Farmers Co-op, West Glacier Water Users Inc.)
- School Districts (ex. Wilsall, West Yellowstone, Judith Basin)
- Governmental Agencies (ex. DNRC, DPPHS, U.S. Army Corps of Engineers, U.S. Bureau of Reclamation)

This list is illustrative and not exhaustive. The Department has similarly issued municipal use permits to a wide variety of entities:

- Religious Organizations (ex. Church Universal Triumphant, Inc.
- Home Owners Associations (ex. Eastgate Water and Sewer Association, Greenacres West, Hillcrest Estates)
- Private Water Companies (ex. Mountain Water Company, Big Mountain Water Company, Linda Vista Water Company)
- Other Companies/Organizations (Borchers of Finley Point, Inc., Mountain River Heights, Stillwater Estates Utilities LLC.)
- Governmental Agencies (ex. DNRC, Department of Corrections)
- Individuals (ex. Charles Vergeront)
- Water and Sewer Districts (ex. Ashland, Absarokee, Big Sky, Coram East Glacier)

This list is likewise illustrative and not exhaustive. The Legislature is presumed to be aware of the actions of the Department and the Montana Water Court with regard to permits and claims for municipal use by a variety of persons and entities, and have taken no action to stop this activity. The Montana Supreme Court has clearly stated that when an executive agency's statutory interpretation has stood unchallenged for a considerable length of time, it will be regarded as of great importance in arriving at the proper construction of a statute. Montana Power Co. v. Montana Public Service Commission, 2001 Mont. 102, ¶ 24, 305 Mont. 260, 26 P.3d 91, Glendive Medical Center, Inc. v. Montana Department of Public Health and Human Services, 2000 MT 218, ¶ 14, 310 Mont. 156, 49 P.3d 560, State v. Snider (1975), 168 Mont. 220, 226, 541 P.2d 1204, 1208 (where common practice exists and the Legislature has the opportunity to provide otherwise and does not, a legislative intent to authorize such practice is presumed). The Legislation further confirmed the practice that private entities may hold a water right for municipal use by passing Mont. Code Ann. §85-2-227(4) .

1 The Faust Group argue that DNRC has not issued permits to a non municipality or
2 unincorporated town within a basin closure area in the past. I find no citation to any authority
3 upon which the Department can justify treating an applicant for “municipal use” within a closure
4 differently, on the basis of the character of the applicant, from one outside a basin closure.

5 Municipal uses are inherently public uses of water, and this public character of the
6 underlying use distinguishes municipal appropriations from an amalgamation of domestic,
7 commercial, and irrigations uses. Municipal uses reflect water demands not just for potable
8 supplies and the irrigation of lawns and gardens, but also for other public uses such as fire
9 fighting and suppression. The “appropriation of water for a municipal use by public water
10 districts, cities, and public utility corporations contemplates such public uses for the benefit of
11 the citizenry as fire protection, sprinkling of streets, watering of parks, and use in public
12 buildings, as well as personal use of individual citizens in connection with their business
13 establishments as well as their homes and lawns.” Hutchins, Water right Laws in the Nineteen
14 Western States, Vol. 1, p532; see e.g., 30 TX ADC § 297.1 (32); A.R.S. § 45-561 (11); 23 CA
15 ADC § 663; RCWA 90.03.015 (4). Here the design and construction of these systems is
16 regulated by the Montana DEQ as public water supply systems. See Finding Of Fact No. 18.
17 The intended purposes are designed and constructed as a single integrated system for the
18 pumping and delivery of water to homes and businesses in and about the Four Corners area
19 within the Utility Solutions, LLC, service area.

20 A person may not appropriate water except as provided in the Montana Water Use Act,
21 and may appropriate water only for a beneficial use. See Mont. Code Ann. § 85-2-301. A
22 “person” means an individual, association, partnership, corporation, state agency, political
23 subdivision, the United States or any agency of the United States, or any other entity. Mont.
24 Code Ann. § 85-2-102(14). By this definition, the Applicant is a person which can appropriate
25 water for a beneficial use. The proposed use is a municipal use according to past DNRC
26 permitting decisions and according to the description of the use. See Finding of Fact Nos. 11,
27 18, 20, 24.

28 The DNRC’s determination that these Applications are for municipal use allows
29 processing of the beneficial water use permit applications. Because the Applicant is a person, it
30 may appropriate water for a beneficial use. Mont. Code Ann. §§§ 85-2-102(14); 85-2-301; 85-2-
31 342, 343.

1 3. The Department has jurisdiction to issue a provisional permit for the beneficial use of
2 water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 by a preponderance of
3 the evidence. Mont. Code Ann. §85-2-311(1).

4 4. A permit shall be issued if there is water physically available at the proposed point of
5 diversion in the amount that the applicant seeks to appropriate; water can reasonably be
6 considered legally available during the period in which the applicant seeks to appropriate, and in
7 the amount requested, based on an **analysis** of the evidence on physical water availability and
8 the existing legal demands, including but not limited to a comparison of the physical water
9 supply at the proposed point of diversion with the existing legal demands on the supply of water;
10 the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a
11 state reservation will not be adversely affected based on a consideration of an applicant's **plan**
12 for the exercise of the permit that demonstrates that the applicant's use of the water will be
13 controlled so the water right of a prior appropriator will be satisfied; the proposed means of
14 diversion, construction, and operation of the appropriation works are adequate; the proposed
15 use of water is a beneficial use; the applicant has a possessory interest, or the written consent
16 of the person with the possessory interest, in the property where the water is to be put to
17 beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not
18 be adversely affected, the proposed use will be substantially in accordance with the
19 classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of
20 a permit will not be adversely affected. Mont. Code Ann. §85-2-311 (1) (a) through (h).

21 5. The Hearing Examiner may take notice of judicially cognizable or generally recognized
22 technical or scientific facts within the Department's specialized knowledge. Parties shall be
23 notified either before or during the hearing or by reference in the proposal for decision of the
24 material noticed. Parties may contest the materials first noticed in this proposal for decision by
25 filing exceptions to the proposal for decision. ARM 36.12.221(4); ARM 36.12.229. See Finding
26 of Fact No. 13.

27 6. The Applicant has proven that water is physically available at the proposed point of
28 diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont.
29 Code Ann. §85-2-311(1)(a)(i). See Finding of Fact No. 14.

30 7. The Applicant has proven that water can reasonably be considered legally available.
31 Mont. Code Ann. §85-2-311(1)(a)(ii). See Finding of Fact No. 15.

1 8. The Applicant has proven that the water rights of prior (ground or surface water)
2 appropriators under existing water rights, certificates, permits, or state reservations will not be
3 adversely affected when conditioned according to the plan set forth in the Permit Consent: (1) to
4 limit the acres that may be irrigated; (2) to meter and record water diverted, install an access
5 tube and sampling port, provide researchers access to their wells for taking well measurements;
6 (3) to augment in accordance with Part II of that certain Consent To Administrative Order
7 executed by the Parties in the Matter of Application To Change Water Right No. 41H 30014080
8 (Change Consent); (4) to prohibit Applicant from further use of the water treated at the waste
9 water treatment plant and discharged into the disposal beds; (5) to prohibit redundant water
10 amounts for the water appropriated under Application for Beneficial Water Use Permit No. 41H
11 115469-00 and these Applications. Diversion under these Applications may not commence until
12 the proposed water right change necessary for augmentation is approved and augmentation is
13 implemented. Diversion under these Applications must stop if augmentation as planned ceases.
14 Nothing in this decision approves, impliedly or otherwise, the granting of any applications for
15 permits or changes other than those in the caption to this proceeding.

16 Applicant's plan to assure the water rights of prior appropriators will be satisfied is to
17 change water rights that have been historically used for irrigation to an "augmentation" purpose
18 in order to fulfill its augmentation requirements under the Zoot Order, *supra*, and to make up for
19 the consumptive portion of the proposed new use.

20 Mont. Code Ann. §85-2-311 states that DNRC shall issue a permit if an applicant for
21 beneficial water use proves by a preponderance of evidence that certain criteria, here adverse
22 affect, are met. It may be necessary for an applicant to make use of new technology or
23 specialized equipment to meet one or more of the criteria. If an application is dependent on
24 special management, technology or measurement to ensure there will be no adverse affect to
25 other water users DNRC can and routinely does, condition a new permit's use on use of that
26 special management, technology or measurement. See Mont. Code Ann. § 85-2-312. There is
27 simply no indication in the sections of the Montana Water Use Act that govern the new water
28 use permitting process (Mont. Code Ann. § 85-2-301, *et.seq.*) that a plan of augmentation,
29 either by replacement of water in a source of supply through a change in use of an existing
30 water right or by other means, is prohibited as a way to preclude adverse affect. See In the
31 Matter of Application No. 41H 115469-00 by Zoot Properties, LLC, Final Order (2005). Montana
32 case law also provides a history of augmentation, including augmentation by new or untried

1 methods. See Thompson v. Harvey (1974), 154 Mont. 133, 519 P.2d 963; Perkins v. Kramer
2 (1966), 148 Mont. 355, 423 P.2d 587. Augmentation is also recognized in other prior
3 appropriation states for various purposes. E.g. C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-
4 561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho).
5 Objectors presented no authority for their proposition that augmentation is not allowed for the
6 purpose of meeting the Mont. Code Ann. § 85-2-311 criteria.

7 Here, Applicant's plan is to augment flows in the West Gallatin River to mitigate any
8 impacts that would have an effect on a prior appropriator, and not to "augment" out of the basin
9 closure statute. Mont. Code Ann. §85-2-311(1)(b). See Finding of Fact Nos. 16, 17.

10 9. The Applicant has proven that the proposed means of diversion, construction, and
11 operation of the appropriation works are adequate. Mont. Code Ann. §85-2-311(1)(c). See
12 Finding of Fact No. 18.

13 10. The Applicant has a possessory interest, or the written consent of the person with the
14 possessory interest, in the property where water is to be put to beneficial use. Mont. Code Ann.
15 §85-2-311(1)(e). See, Finding of Fact No. 21.

16 11. One valid water quality objection was raised as to the issue of water quality of a prior
17 appropriator being adversely affected. However, this Objection was withdrawn prior to the
18 hearing. No valid water quality objections were filed alleging that the proposed use is not in
19 accordance with a classification of water, nor as to the ability of a discharge permit holder to
20 satisfy effluent limitation of a permit. This Hearing Examiner interprets a "withdrawn" objection
21 the same as a "dismissed" objection. See Mont. Admin. R. 36.12.208. That is, it is as if it were
22 never filed. Here, the valid objection was withdrawn, so Applicant need only prove the criteria in
23 Mont. Code Ann. §§ 85-2-311(1)(a-e). Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See
24 Preliminary Matters on page 4, and Finding of Fact No. 22.

25 12. When the DNRC finds the basin closure statutes do not apply, the DNRC may process
26 an application and grant a permit subject to terms, conditions, restrictions, and limitations it
27 considers necessary to satisfy the criteria for issuance of a beneficial water use permit when the
28 Applicant has met the criteria for issuance of a permit. Applicant has met the criteria for
29 issuance of a permit when conditions are applied. Mont. Code Ann. §85-2-312. See Conclusion
30 of Law Nos. 5, 8.

31 **WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the
32 Hearing Examiner makes the following:

1
2 **PROPOSED ORDER:**

3 **Application No. 41H 30012025**

4 Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial
5 Water Use Permit 41H 30012025 is **ISSUED** to Utility Solutions, LLC, to appropriate 800 gallons
6 per minute (gpm) up to 318.8 acre-feet of water per year from ground water. The means of
7 diversion is eight (8) wells located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$,
8 SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, all in
9 Section 11, Township 2 South, Range 4 East, Gallatin County, Montana. The purpose is
10 municipal use. The place of use is within the Utilities Solutions, LLC, service area, in Section 11,
11 and in the E $\frac{1}{2}$, of Section 14, all in Township 2 South, Range 4 East, Gallatin County, Montana.
12 The period of diversion and period of use is January 1 through December 31, inclusive, of each
13 year. The off stream storage with a capacity of 2.3 acre-feet is located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of
14 Section 11, Township 2 South, Range 4 East, Gallatin County, Montana.

15 A. No more than 71.7 acres of lawn and /or gardens may be irrigated with water
16 appropriated under this right.

17 B. Permittee may pump and withdraw water up to the amounts set forth herein from all or
18 any part of the uppermost 100 feet of saturated thickness of the aquifer(s) underlying these
19 points of diversion that the Permittee may elect, and Permittee shall plug any well bore in
20 excess of that 100 foot depth using such methods and practices as are ordinarily and
21 customarily used for such practices.

22 C. Permittee shall install or cause to be installed at each well a meter capable of recording
23 the flow rates and volumetric amounts diverted from each such well. Permittee shall also record
24 the total amount of water treated at its wastewater treatment plant, and the total amount of
25 water discharged into its disposal beds. Permittee shall provide those records to the DNRC by
26 October 15th of each year. Permittee shall install or cause to be installed inside each well a
27 water-level measurement access tube and sampling port to facilitate water level and water
28 quality measurements. Permittee shall cooperate with state, county, and university sponsored
29 researchers to provide access to their wells for the purpose of taking well depth and water
30 quality measurements to the fullest extent possible without compromising Permittee's water
31 delivery operations.

1 D. The Permittee must apply for and be granted a change authorization from the DNRC to
2 augment in accordance with Part II of that certain Consent To Administrative Order executed in
3 the Matter of Application To Change Water Right No. 41H 30014080 (Change Consent) and
4 implement the change before using water under this Permit. If the Permittee does not augment
5 the flows of the West Gallatin River as outlined in the Change Consent and the accompanying
6 change, then appropriation under this Permit shall cease until such augmentation outlined by
7 the Change Consent and an approved change is accomplished.

8 E. The water treated at the waste water treatment plant and discharged to the disposal
9 beds shall be deemed return flow from and after the use provided for herein, and the Permittee
10 shall not further divert or use such return flows under the rights provided for in the Permit.

11 F. The flow and volume of water for domestic and commercial uses applied for in
12 Application 41H 115469-00, and duplicated in this Application, can be diverted under that permit
13 or this permit, but not both.

14
15 **PROPOSED ORDER:**

16 **Application No. 41H 30013629**

17 Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use
18 Permit 41H 30013629 is **ISSUED** to Utility Solutions, LLC, to appropriate 100 gallons per minute
19 (gpm) up to 29.45 acre-feet of water per year from ground water. The water is to be diverted at
20 a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, Township 2 South, Range 4 East, Gallatin County,
21 Montana. The means of diversion is a well. The purpose is municipal use. The place of use is
22 within the Utilities Solutions, LLC, service area, in the NW $\frac{1}{4}$ of Section 14, and in the
23 NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, of Section 15, all in Township 2 South, Range 4 East, Gallatin County,
24 Montana. The period of diversion and period of use is January 1 through December 31,
25 inclusive, of each year.

26 A. No lawns or gardens, nor any other acreage, shall be irrigated with any diversions under
27 this Permit.

28 B. Permittee may pump and withdraw water up to the amount set forth herein from all or
29 any part of the uppermost 100 feet of saturated thickness of the aquifer(s) underlying this point
30 of diversion that the Permittee may elect, and Permittee shall plug any well bore in excess of

1 that 100 foot depth using such methods and practices as are ordinarily and customarily used for
2 such practices.

3 C. Permittee shall install or cause to be installed at the well a meter capable of recording
4 the flow rates and volumetric amounts diverted from each such well. Permittee shall provide
5 those records to the DNRC by October 15th of each year. Permittee shall install or cause to be
6 installed inside each well a water-level measurement access tube and sampling port to facilitate
7 water level and water quality measurements. Permittee shall cooperate with state, county, and
8 university sponsored researchers to provide access to their wells for the purpose of taking well
9 depth and water quality measurements to the fullest extent possible without compromising
10 Permittee's water delivery operations.

11 D. The Permittee must apply for and be granted a change authorization from the DNRC to
12 augment in accordance with Part II of that certain Consent To Administrative Order executed in
13 the Matter of Application To Change Water Right No. 41H 30014080 (Change Consent)) and
14 implement the change before using water under this Permit. If the Permittee does not augment
15 the flows of the West Gallatin River as outlined in the Change Consent and the accompanying
16 change, then appropriation under this Permit shall cease until augmentation outlined by the
17 Change Consent and an approved change is accomplished.

18 E. The water treated at the waste water treatment plant and discharged to the disposal
19 beds shall be deemed return flow from and after the use provided for herein, and the Permittee
20 shall not further divert or use such return flows under the rights provided for in the Permit.

21 22 **NOTICE**

23 This Proposal for Decision may be adopted as the Department's final decision unless
24 timely exceptions are filed as described below. Any party adversely affected by this Proposal for
25 Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral
26 argument. Exceptions and briefs, and requests for oral argument must be filed with the
27 Department by July 13, 2006, or postmarked by the same date, and copies mailed by that same
28 date to all parties.

29 Parties may file responses and response briefs to any exception filed by another party.
30 The responses and response briefs must be filed with the Department by July 24, 2006, or
31 postmarked by the same date, and copies must be mailed by that same date to all parties. No
32 new evidence will be considered.

1 No final decision shall be made until after the expiration of the above time periods, and
2 due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

3 Dated this 23rd day of June 2006.

4
5 / Original Signed By Charles F Brasen /

6 Charles F Brasen
7 Hearings Officer
8 Water Resources Division
9 Department of Natural Resources
10 and Conservation
11 PO Box 201601
12 Helena, Montana 59620-1601
13

14 Att: 1: Consent To Administrative Order executed by the Parties in the Matter of
15 Beneficial Water Use Permit Application No. 41H 30012025 and No. 41H
16 30013629
17 2: Consent To Administrative Order executed by the Parties in the Matter of
18 Application To Change Water Right No. 41H 30014080

RECEIVED

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
WATER RESOURCES DIVISION
STATE OF MONTANA

DEC 13 2005

MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
WATER RESOURCES UNIT

IN THE MATTER OF THE APPLICATIONS FOR
BENEFICIAL WATER USE PERMITS NO.
30012025 AND NO. 30013629 BY UTILITY
SOLUTIONS, LLC

Consent to Entry of Administrative
Orders

Comes now the undersigned parties to the above-entitled matters, by and through their attorneys, and agree that the above-named applications fully comply with the requirements set forth in MCA 85-2-311, provided that the approval of the DNRC of the above-named applications contains the material conditions to the exercise of the water rights set forth herein, in addition to all other conditions that are usually and customarily appended by the DNRC to any authorization to change an existing water right.

Application No. 30012025 (Utility Solutions' 8-Well Application).

A.) Flow Rate and Volume: 800 gpm up to 318.8 acre feet per year.

B.) Lawn and Garden Acreage Restriction: No more than 71.7 acres of lawn and/or gardens may be irrigated.

C.) Place of Use: The place of use is located in the:

Section 11, T2S, R4E, Gallatin County; and the East ½ of Section 14, T2S, R4E, Gallatin County, MT

D.) Points of Diversion: The points of diversion shall be comprised of eight alternate points of diversion located:

SE¼, NE¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

SW¼, NE¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

Consent to Entry of Administrative Orders 1

Attachment 1 Page 1:

Consent To Administrative Order In the Matter of Beneficial Water Use Permit Application
No. 41H 30012025 and No. 41H 30013629

1 NW¼, SE¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

2 SE¼, SW¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

3 NW¼, NE¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

4 NW¼, NE¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

5 SW¼, NE¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

6 NE¼, NW¼, SE¼, of Section 11, T2S, R4E, Gallatin County, MT

7 Permittee may pump and withdraw water up to the amounts set forth herein from all or
8 any part of the uppermost 100 feet of saturated thickness of the aquifer(s) underlying
9 these points of diversion that the Permittee may elect, and Permittee shall plug any well
10 bore in excess of that 100 foot depth using such methods and practices as are ordinarily
11 and customarily used for such practices.

12
13 **E.) Measurement:** Permittee shall install or cause to be installed at each well a meter capable of
14 recording the flow rates and volumetric amounts diverted from each such well. Permittee
15 shall also record the total amount of water treated at its wastewater treatment plant, and the
16 total amount of water discharged into its disposal beds. Permittee shall provide those
17 records to the DNRC by October 15th of each year. Permittee shall install or cause to be
18 installed inside each well a water-level measurement access tube and sampling port to
19 facilitate water level and water quality measurements. Permittee shall cooperate with state,
20 county, or university sponsored researchers to provide access to their wells for the purpose
21 of taking well depth and water quality measurements to the fullest extent possible without
22 compromising Permittee's water delivery obligations.

23
24 **F.) Augmentation:** The exercise of this Permit shall be augmented in accordance with Part II
25 of that certain Consent to Administrative Order executed by the parties hereto in that action

Consent to Entry of Administrative Orders 2

Attachment 1 Page 2:
Consent To Administrative Order In the Matter of Beneficial Water Use Permit Application
No. 41H 30012025 and No. 41H 30013629

1 styled In the Matter of the Application to Change Water Right No. 41H- 30014080 of even
2 date herewith.

3 **G.) Treated Wastewater Effluent:** The water treated at the waste water treatment plant
4 and discharged to the disposal beds shall be deemed return flow from and after the use
5 provided for herein, and the Permittee shall not further divert or use such return flows under
6 the rights provided for in the Permit.

7
8
9
10 **Application No. 30013629**

11
12 **A) Flow Rate and Volume:** 100 gpm up to 29.45 acre feet per year. No lawns or gardens,
13 nor any other acreage, shall be irrigated with any diversions hereunder.

14 **B.) Place of Use:** The place of use is located in:

15 SW¼ of Section 14, T2S, R4E, Gallatin County, MT

16 SW¼, NE¼, NE¼, of Section 15, T2S, R4E, Gallatin County, MT

17 **C.) Point of Diversion:** The point of diversion shall be comprised of a wells located in

18 SE¼, NW¼, SE¼, of Section 11, T2S, R4E, Gallatin County,

19 SE¼, NE¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

20 SW¼, NE¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

21 NW¼, SE¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

22 SE¼, SW¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

23 NW¼, NE¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

24 NW¼, NE¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

25 SW¼, NE¼, NE¼, of Section 11, T2S, R4E, Gallatin County, MT

Consent to Entry of Administrative Orders 3

Attachment 1 Page 3:
Consent To Administrative Order In the Matter of Beneficial Water Use Permit Application
No. 41H 30012025 and No. 41H 30013629

1 NE¼, NW¼, SE¼, of Section 11, T2S, R4E, Gallatin County, MT

2
3 D.) Permittee may pump and withdraw water up to the amounts set forth herein from all or
4 any part of the uppermost 100 feet of saturated thickness of the aquifer(s) underlying
5 these points of diversion that the Permittee may elect, and Permittee shall plug any well
6 bore in excess of that 100 foot depth using such methods and practices as are ordinarily
7 and customarily used for such practices.

8 E.) **Measurement:** Permittee shall install or cause to be installed at each well a meter
9 capable of recording the flow rates and volumetric amounts diverted from the well.
10 Permittee shall provide those records to the DNRC by October 15th of each year.
11 Permittee shall install or cause to be installed inside each well a water-level
12 measurement access tube and sampling port to facilitate water level and water quality
13 measurements. Permittee shall cooperate with state, county, or university sponsored
14 researchers to provide access to their wells for the purpose of taking well depth and
15 water quality measurements to the fullest extent possible without compromising
16 Permittee's water delivery obligations.

17 F.) **Augmentation:** The exercise of this Permit shall be augmented in accordance with Part
18 II of that certain Consent to Administrative Order executed by the parties hereto in that
19 action styled In the Matter of the Application to Change Water Right No. 41H-
20 30014080 of even date herewith.

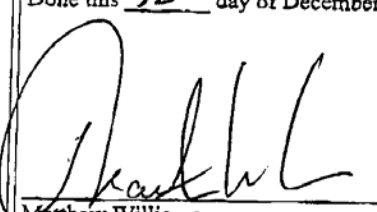
21 G.) **Treated Wastewater Effluent:** The water treated at the waste water treatment plant
22 and discharged to the disposal beds shall be deemed return flow from and after the use
23 provided for herein, and the Permittee shall not further divert or use such return flows under
24 the rights provided for in the Permit.
25

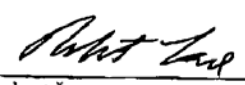
Consent to Entry of Administrative Orders 4


Attachment 1 Page 4:
Consent To Administrative Order In the Matter of Beneficial Water Use Permit Application
No. 41H 30012025 and No. 41H 30013629


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Done this 12th day of December, 2005


Matthew Williams
Attorney for Utility Solutions, LLC


Robert Lane
Attorney for Montana Department of Fish,
Wildlife & Parks


Laura Zierner
Attorney for Montana Trout
Unlimited


David Weaver
Attorney for Francis Kelly, Deloris
Kelly, Walt Sales, Association of
Gallatin Agricultural Irrigators

Consent to Entry of Administrative Orders 5


Attachment 1 Page 5:
Consent To Administrative Order In the Matter of Beneficial Water Use Permit Application
No. 41H 30012025 and No. 41H 30013629

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Done this 12~~th~~ day of December, 2005

Matthew Williams
Attorney for Utility Solutions, LLC

Robert Lane
Attorney for Montana Department of Fish,
Wildlife & Parks


Laura Ziemer
Attorney for Montana Trout
Unlimited

David Weaver
Attorney for Francis Kelly, Deloris
Kelly, Walt Sales, Association of
Gallatin Agricultural Irrigators

Consent to Entry of Administrative Orders 5

Attachment 1 Page 6:
Consent To Administrative Order In the Matter of Beneficial Water Use Permit Application
No. 41H 30012025 and No. 41H 30013629

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Done this _____ day of December, 2005

Matthew Williams
Attorney for Utility Solutions, LLC

Robert Lane
Attorney for Montana Department of Fish,
Wildlife & Parks

Laura Zierner
Attorney for Montana Trout
Unlimited

David Weaver
Attorney for Francis Kelly, Deloris
Kelly, Walt Sales, Association of
Gallatin Agricultural Irrigators

Consent to Entry of Administrative Orders 5

Attachment 1 Page 7:
Consent To Administrative Order In the Matter of Beneficial Water Use Permit Application
No. 41H 30012025 and No. 41H 30013629

RECEIVED DEC 13 2005 MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION HEARINGS UNIT	
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION WATER RESOURCES DIVISION STATE OF MONTANA *****	
IN THE MATTER OF THE APPLICATION TO CHANGE WATER RIGHT NO. 41H 30014080 BY UTILITY SOLUTIONS, LLC	Consent to Entry of Administrative Order
<p>Comes now the undersigned parties to the above-entitled matter, by and through their attorneys, and agree that the above-named application fully complies with the requirements set forth in MCA 85-2-402 and all other requirements of the Montana Water Use Act, provided that the approval of the DNRC of the above-named application contains the following material conditions to the exercise of the water rights under the changed conditions, in addition to all other conditions that are usually and customarily appended by the DNRC to any authorization to change an existing water right:</p> <p>I. Augmentation of Zoot Wells.</p> <p>A.) 0.17 cfs up to 51.8 acre feet per year out of Water Right No. 41H-126910-00, and 0.06 cfs up to 18.2 acre feet per year out of Water Right No. 41H-126909-00, shall not hereafter be diverted from the Gallatin River, and shall otherwise be left in the Gallatin River, to augment any depletions to Gallatin River flows arising out of or related to the exercise of any rights inuring in Water Use Permit No. 11546900-41H. Act, provided</p> <p>B.) The period of use shall be from May 1st through September 30th.</p>	
Consent to Entry of Administrative Order 1	

Attachment 2 Page 1:
Consent To Administrative Order In the Matter of Application To Change Water Right No.
41H 30014080

D.) As conditioned in accordance with subparagraphs A through C, the change of 0.23 cfs up to 70 acre feet per year complies with Paragraph C of the DNRC's Final Order approving the issuance of Water Use Permit No. 11546900-41H.

A). 0.16 cfs, up to 35.1 acre feet per year, out of Water Right No. 41H-126909-00, and 0.44 cfs, up to 99 acre feet per year out of 41H 126910, shall be diverted from the date in the spring that the Beck & Border Ditch first carries water through September 30th, or until 134.1 acre feet has been reached, whichever date is earlier, from the diversion point of the Beck & Border Ditch in the NWSWSE of Section 14, Township 2 South, Range 4 East, Gallatin County, and, after ditch loss, 0.12 cfs, up to 33.8 acre feet per year out of Water Right No. 41H-126909-00, and 0.43 cfs thereof up to 90.2 acre feet per year shall thereafter be diverted from the Beck & Border Ditch into infiltration galleries located in the NE¼ of Section 11, T2S, R4E for the purposes of augmenting any depletions to the flows of the Gallatin River arising from the exercise of any rights inuring in any water use permit issued by the DNRC under Application for Beneficial Water Use Permit No. 30012025 and Application for Beneficial Water Use Permit No. 30013629.

C). As conditioned in accordance with subparagraph A and subparagraph B, the diversion of the net proceeds from the sale of the artwork shall be used to offset the net cost per year of the artwork and the net cost of the artwork shall be used to offset the net cost of the artwork and the net cost of the artwork shall be used to offset the net cost of the artwork.

1 consumptive use arising out of or related to any water use permits that the DNRC will
2 issue under Application for Beneficial Water Use Permit No. 30012025 and Application
3 for Beneficial Water Use Permit No. 30013629.
4
5 **III. Administration of Water Rights.**
6 A.) All the remaining water and water rights not provided for in Paragraph A hereof,
7 consisting of 0.46 cfs out of Water Right No. 41H 126909, and 1.27 cfs out of Water
8 Right No. 41H 126910 shall not hereafter be diverted and shall otherwise be left in the
9 Gallatin River, but shall be administered by calling the designated amounts to the
10 diversion point of the Beck & Border Ditch in the NWSWE of Section 14, Township 2
11 South, Range 4 East, Gallatin County.
12
13 Signed this 12th day of December, 2005
14
15
16
17
18
19
20 Matthew Williams
Attorney for Utility Solutions, LLC
21
22 Robert Lane
Attorney for Montana Department of Fish,
23 Wildlife & Parks
24
25 Laura Ziemer
Attorney for Montana Trout Unlimited
David Weaver
Attorney for Francis Kelly, Deloris Kelly, Walt Sales, Association of Gallatin Agricultural Irrigators

Consent to Entry of Administrative Order

Attachment 2 Page 3:
Consent To Administrative Order In the Matter of Application To Change Water Right No.
41H 30014080

1 consumptive use arising out of or related to any water use permits that the DNRC will
2 issue under Application for Beneficial Water Use Permit No. 30012025 and Application
3 for Beneficial Water Use Permit No. 30013629.
4

5 **III. Administration of Water Rights.**

6 A.) All the remaining water and water rights not provided for in Paragraph A hereof,
7 consisting of 0.46 cfs out of Water Right No. 41H 126909, and 1.27 cfs out of Water
8 Right No. 41H 126910 shall not hereafter be diverted and shall otherwise be left in the
9 Gallatin River, but shall be administered by calling the designated amounts to the
10 diversion point of the Beck & Border Ditch in the NWSWE of Section 14, Township 2
11 South, Range 4 East, Gallatin County.
12

13 Signed this 12th day of December, 2005

14
15
16
17
18
19 Matthew Williams
20 Attorney for Utility Solutions, LLC

21
22
23 Robert Lane
24 Attorney for Montana Department of Fish,
25 Wildlife & Parks

17 cfs out of Water
otherwise be left in the
amounts to the
Attorney for Montana Trout
Unlimited Section 14, Township

David Weaver
Attorney for Francis Kelly, Deloris
Kelly, Walt Sales, Association of
Gallatin Agricultural Irrigators

Attachment 2 Page 4:
Consent To Administrative Order In the Matter of Application To Change Water Right No.
41H 30014080

1 consumptive use arising out of or related to any water use permits that the DNRC will
2 issue under Application for Beneficial Water Use Permit No. 30012025 and Application
3 for Beneficial Water Use Permit No. 30013629.

4
5 **III. Administration of Water Rights.**

6 **A.)** All the remaining water and water rights not provided for in Paragraph A hereof,
7 consisting of 0.46 cfs out of Water Right No. 41H 126909, and 1.27 cfs out of Water
8 Right No. 41H 126910 shall not hereafter be diverted and shall otherwise be left in the
9 Gallatin River, but shall be administered by calling the designated amounts to the
10 diversion point of the Beck & Border Ditch in the NWSWSE of Section 14, Township 2
11 South, Range 4 East, Gallatin County.

12
13 Signed this _____ day of December, 2005

14
15
16
17
18 Matthew Williams
Attorney for Utility Solutions, LLC

19
20
21 Robert Lane
Attorney for Montana Department of Fish,
22 Wildlife & Parks

17
18 Laura Ziemer
Attorney for Montana Trout
Unlimited

19
20
21 David Weaver
Attorney for Francis Kelly, Deloris
22 Kelly, Walt Sales, Association of
Gallatin Agricultural Irrigators

23
24
25
Consent to Entry of Administrative Order 3

Attachment 2 Page 5:
Consent To Administrative Order In the Matter of Application To Change Water Right No.
41H 30014080

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 23rd day of June 2006 by first class United States mail

UTILITY SOLUTIONS LLC
%BARBARA CAMPBELL
PO BOX 10098
BOZEMAN, MT 59773-0098

MATTHEW WILLIAMS - ATTORNEY
WILLIAMS & JENT
506 E. BABCOCK
BOZEMAN MT 59715
(F) 406-586-4548

DONALD MACINTYRE - ATTORNEY
ATTORNEY AT LAW
307 N JACKSON ST
HELENA, MT 59601 5009

DAVID L WEAVER - ATTORNEY
1700 W KOCH SUITE 4
BOZEMAN, MT 59715

ARTHUR WITTICH - ATTORNEY
602 FERGUSON AVE, SUITE 5
BOZEMAN, MT 59718
(F) 406-585-2811

LAURA ZIEMER - ATTORNEY
321 E MAIN ST STE 411
BOZEMAN, MT 59715

STAN BRADSHAW, - ATTORNEY
PO BOX 412
HELENA, MT 59624

BILL SCHENK - ATTORNEY
1420 EAST SIXTH AVENUE
PO BOX 200701
HELENA MT 59620

ROBERT LANE - ATTORNEY
1420 EAST SIXTH AVENUE
PO BOX 200701
HELENA MT 59620

CC:
WATER RESOURCES REGIONAL OFFICE
2273 BOOT HILL COURT, SUITE 110
BOZEMAN, MT 59715

RUSSELL LEVENS – **Hand Delivered**
PO BOX 201601
HELENA, MT 59620-1601

/ Original Signed By Jamie Scow /

JAMIE SCOW
HEARINGS UNIT, 406-444-6615

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NOS.)
41H-30012025 AND 41H-30013629 BY)
UTILITY SOLUTIONS LLC)**

FINAL ORDER

BACKGROUND

The Proposal for Decision in this matter was entered on June 23, 2006. The proposal recommended that Permit Nos. 41H-30012025 and 41H-30012629 be issued subject to certain terms and conditions. Objectors Roslee Faust, James Lohmeier, Charles Brodie, Paul Shennum, Sandra McManus, West Gallatin Canal Company and Montana River Action Network (collectively "Objectors"), jointly filed written exceptions to the Proposal for Decision and Applicant, Utility Solutions, LLC filed a written response to the exceptions. No request for oral argument was made by either party. This matter is submitted for a final decision based upon the record of the proceedings and the exceptions and response thereto.

STANDARD OF REVIEW

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order:

reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

"Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. (Strom v. Logan, 304 Mont. 176, 18 P.3d 1024 (2001)) Furthermore, only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. (ARM 36.12.229(2)) The record was closed at the end of the hearing. No evidence presented after the record was closed has been considered in this decision. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, and authorities

upon which the party relies. (ARM 36.12.229(1)). I have considered the exceptions and reviewed the record under these standards.

DISCUSSION

Issues

Objectors' exceptions to the Proposal for Decision fall into two categories. First, the Objectors contend that granting of the applications would violate the Basin Closure Law, MCA § 85-2-343 because Utility Solutions does not qualify as a municipal use. Specifically, the Objectors take exception to Conclusion of Law No. 2 and Finding of Fact Nos. 12 and 24. Secondly, the Objectors contend that the Montana Water Use Act does not allow for augmentation to mitigate adverse affects upon prior appropriators. Specifically, Objectors take exception to Conclusion of Law No. 8.

Finding of Fact 12

Finding of Fact No. 12 states "[t]he Applicant has a contract to provide water to the Four Corners County Water and Sewer District for the use proposed under these Applications." There is no reference to the record regarding this Finding of Fact. I find that this Finding of Fact is not a determination that a *valid* contract exists between the Applicant and Four Corners County Water and Sewer District, but rather (since it was brought up in the hearing) that the evidence in the record supports such a relationship exists. Objectors also complain that Four Corners County Water and Sewer District is not a validly constituted entity. As the Hearing Examiner explains in the Proposal for Decision, he does not have the authority to decide if an agreement is valid or if the Four Corners County Water and Sewer District is not a validly constituted entity. While Finding of Fact No. 12 is legally beyond the scope of the Hearing Examiner's authority, I find that any error is harmless. Finding of Fact No. 12 will not be rejected or modified.

Finding of Fact 24

Objectors assert that the Hearing Examiner's characterization of municipal use as including the terms "firefighting" and "parks" suggests that water will be used for the benefit of the general public and there was no evidence in the record to show that the Applicant plans to put the water to such use nor any evidence as to what amount or percentage of water would be put to such uses. Enumeration of specific types of uses, and the amount allocated to each,

which are encompassed by the phrase “municipal use” is not necessary and in this instance is only for illustrative purposes. I find that the record and testimony in this matter supports Finding of Fact No. 24 in that the type of use proposed for the water by these applications is “. . . of the type normally found in a municipal use.” Finding of Fact No. 24 will not be rejected or modified.

Conclusion of Law 2

Conclusion of Law No. 2 makes the determination that the proposed use is a municipal use. Objectors first assert that when the applications were received, the Department did not conduct a threshold determination that the applications were indeed for municipal use and relied only on the Applicant's statement that they were. In fact, the Department does make a threshold determination regarding the purpose of use for an application. That threshold is a review of the statements made in the application itself. It is then through the processing and development of facts, either through the Department's processing or through a contested case proceeding (as in this situation) where a definitive determination of actual proposed purpose of use. The Department's processing of the applications in this matter was not procedurally flawed as Objectors suggest.

Conclusion of Law No. 2 clearly articulates that municipal use is not dependent upon the character of the appropriator but rather upon the type of use made of the water. Objectors do not provide any authority in their exception that Applicant should not qualify for a municipal use, other than the repealed rule of the Department. I find the Hearing Examiner's explanation of municipal use persuasive. Conclusion of Law No. 2 will not be rejected or modified.

Conclusion of Law 8

Conclusion of Law No. 8 addresses the Applicant's *plan* “for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied.” Mont. Code Ann. § 85-2-311(b). The Hearings Examiner properly determined that the Applicant's *plan* is adequate to meet the criteria. What the Hearings Examiner *did not* determine in the instant proceeding is whether the Applicant's *plan*, which entails a change in a water right to augmentation, can satisfy the criteria for a change application found in MCA § 85-2-402(2). Objectors exception in the instant proceeding to this Conclusion of Law is misdirected in that they attempt to show that augmentation is not a beneficial use of water (one of the criteria in MCA § 85-2-402(2)) as opposed to arguing that the

plan is not adequate to protect prior appropriators. Such an argument the Objectors do not make in their exceptions. Conclusion of Law No. 8 will not be rejected or modified.

ORDER

The Department hereby adopts and incorporates by reference the Findings of Fact and Conclusions of Law in the Proposal for Decision in this matter.

Application No. 41H 30012025

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41H 30012025 is **ISSUED** to Utility Solutions, LLC, to appropriate 800 gallons per minute (gpm) up to 318.8 acre-feet of water per year from ground water. The means of diversion is eight (8) wells located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, all in Section 11, Township 2 South, Range 4 East, Gallatin County, Montana. The purpose is municipal use. The place of use is within the Utilities Solutions, LLC, service area, in Section 11, and in the E $\frac{1}{2}$, of Section 14, all in Township 2 South, Range 4 East, Gallatin County, Montana. The period of diversion and period of use is January 1 through December 31, inclusive, of each year. The off stream storage with a capacity of 2.3 acre-feet is located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, Township 2 South, Range 4 East, Gallatin County, Montana.

- A. No more than 71.7 acres of lawn and /or gardens may be irrigated with water appropriated under this right.
- B. Permittee may pump and withdraw water up to the amounts set forth herein from all or any part of the uppermost 100 feet of saturated thickness of the aquifer(s) underlying these points of diversion that the Permittee may elect, and Permittee shall plug any well bore in excess of that 100 foot depth using such methods and practices as are ordinarily and customarily used for such practices.
- C. Permittee shall install or cause to be installed at each well a meter capable of recording the flow rates and volumetric amounts diverted from each such well. Permittee shall also record the total amount of water treated at its wastewater treatment plant, and the total amount of water discharged into its disposal beds. Permittee shall provide those records to the DNRC by October 15th of each year. Permittee shall install or cause to be installed inside each well a

water-level measurement access tube and sampling port to facilitate water level and water quality measurements. Permittee shall cooperate with state, county, and university sponsored researchers to provide access to their wells for the purpose of taking well depth and water quality measurements to the fullest extent possible without compromising Permittee's water delivery operations.

D. The Permittee must apply for and be granted a change authorization from the DNRC to augment in accordance with Part II of that certain Consent To Administrative Order executed in the Matter of Application To Change Water Right No. 41H 30014080 (Change Consent) and implement the change before using water under this Permit. If the Permittee does not augment the flows of the West Gallatin River as outlined in the Change Consent and the accompanying change, then appropriation under this Permit shall cease until such augmentation outlined by the Change Consent and an approved change is accomplished.

E. The water treated at the waste water treatment plant and discharged to the disposal beds shall be deemed return flow from and after the use provided for herein, and the Permittee shall not further divert or use such return flows under the rights provided for in the Permit.

F. The flow and volume of water for domestic and commercial uses applied for in Application 41H 115469-00, and duplicated in this Application, can be diverted under that permit or this permit, but not both.

Application No. 41H 30013629

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41H 30013629 is **ISSUED** to Utility Solutions, LLC, to appropriate 100 gallons per minute (gpm) up to 29.45 acre-feet of water per year from ground water. The water is to be diverted at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, Township 2 South, Range 4 East, Gallatin County, Montana. The means of diversion is a well. The purpose is municipal use. The place of use is within the Utilities Solutions, LLC, service area, in the NW $\frac{1}{4}$ of Section 14, and in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, of Section 15, all in Township 2 South, Range 4 East, Gallatin County, Montana. The period of diversion and period of use is January 1 through December 31, inclusive, of each year.

A. No lawns or gardens, nor any other acreage, shall be irrigated with any diversions under this Permit.

B. Permittee may pump and withdraw water up to the amount set forth herein from all or any part of the uppermost 100 feet of saturated thickness of the aquifer(s) underlying this point of diversion that the Permittee may elect, and Permittee shall plug any well bore in excess of

that 100 foot depth using such methods and practices as are ordinarily and customarily used for such practices.

C. Permittee shall install or cause to be installed at the well a meter capable of recording the flow rates and volumetric amounts diverted from each such well. Permittee shall provide those records to the DNRC by October 15th of each year. Permittee shall install or cause to be installed inside each well a water-level measurement access tube and sampling port to facilitate water level and water quality measurements. Permittee shall cooperate with state, county, and university sponsored researchers to provide access to their wells for the purpose of taking well depth and water quality measurements to the fullest extent possible without compromising Permittee's water delivery operations.

D. The Permittee must apply for and be granted a change authorization from the DNRC to augment in accordance with Part II of that certain Consent To Administrative Order executed in the Matter of Application To Change Water Right No. 41H 30014080 (Change Consent) and implement the change before using water under this Permit. If the Permittee does not augment the flows of the West Gallatin River as outlined in the Change Consent and the accompanying change, then appropriation under this Permit shall cease until augmentation outlined by the Change Consent and an approved change is accomplished.

E. The water treated at the waste water treatment plant and discharged to the disposal beds shall be deemed return flow from and after the use provided for herein, and the Permittee shall not further divert or use such return flows under the rights provided for in the Permit.

NOTICE

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 9th day of November 2006.

/Original signed by David A. Vogler/

David A. Vogler
Hearing Examiner
Department of Natural Resources
And Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 9th day of November 2006 by first class United States mail

UTILITY SOLUTIONS LLC
%BARBARA CAMPBELL
PO BOX 10098
BOZEMAN MT 59773-0098

MATTHEW WILLIAMS - ATTORNEY
WILLIAMS & JENT
506 E. BABCOCK
BOZEMAN MT 59715
(F) 406-586-4548

DONALD MACINTYRE - ATTORNEY
ATTORNEY AT LAW
307 N JACKSON ST
HELENA MT 59601-5009

DAVID L WEAVER - ATTORNEY
1700 W KOCH SUITE 4
BOZEMAN MT 59715

ARTHUR WITTICH - ATTORNEY
602 FERGUSON AVE, SUITE 5
BOZEMAN MT 59718
(F) 406-585-2811

LAURA ZIEMER – ATTORNEY
321 E MAIN ST STE 411
BOZEMAN MT 59715

STAN BRADSHAW, - ATTORNEY
PO BOX 412
HELENA MT 59624

BILL SCHENK - ATTORNEY
1420 EAST SIXTH AVENUE
PO BOX 200701
HELENA MT 59620

ROBERT LANE - ATTORNEY
1420 EAST SIXTH AVENUE
PO BOX 200701
HELENA MT 59620

CC:
WATER RESOURCES REGIONAL OFFICE
2273 BOOT HILL COURT, SUITE 110
BOZEMAN MT 59715

RUSSELL LEVENS – **Hand Delivered**
PO BOX 201601
HELENA MT 59620-1601

/Original signed by Jamie Price/

Jamie Price
HEARINGS UNIT, 406-444-6615